Supreme Court, U.S.
FILED
SEP 2 1999
OFFICE OF THE CLERK

No. 98-1464

In the

Supreme Court of the United States

Janet Reno, Attorney General, et al.,

Petitioners,

v.

Charlie Condon, Attorney General of South Carolina, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of Amicus Curiae in Support of Respondent

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Home School Legal Defense Association
119 C Street SE
Washington, DC 20003
(202) 547-9222

* *Counsel of Record*

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the Commerce Clause give Congress the power to regulate state governments directly?

TABLE OF CONTENTS

Question Presented i

Table of Contents iii

Table of Authorities iv

Interest of the *Amicus* 1

Summary of Argument 2

Argument 4

I. Our Founders Originally Intended to Prohibit Direct Federal Regulation of State Governments 4

A. The Original Intent of the Founders 4

B. Freedom Through Federalism 7

C. Nationalism v. Federalism 9

D. The Renaissance of Dual Sovereignty 11

II. DPPA Exceeds the Limited Power Our Founders Granted to Regulate "Commerce Among the Several States" 15

A. The Text of the Commerce Clause is Quite Limited 15

B. Our Founders Saw The Commerce Power As Very Limited 16

C. The Commerce Clause Must Never Be Misused to Violate the Guarantee of a "Republican Form of Government" 18

Conclusion 20

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
119 S. Ct. 2240 (1999) 1, 14, 15

Florida Prepaid v. College Savings Bank,
119 S. Ct. 2199 (1999) 14

Fry v. United States,
421 U.S. 542 (1975) 10

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985) 11, 12, 19

Gregory v. Ashcroft,
501 U.S. 452 (1991) 12, 13

National League of Cities v. Usery,
426 U.S. 833 (1976). 11

New York v. United States,
505 U.S. 144 (1992) ..... passim

Printz v. United States,
521 U.S. 898 (1997) 2, 13, 14, 15

U.S. Term Limits v. Thornton,
514 U.S. 779 (1995) 4

United States v. Lopez,
514 U.S. 549 (1995) 8

Virginia v. West Virginia,
246 U.S. 565 (1918) 6

Statutes

Cable Communications Policy Act of 1984, 47 U.S.C. § 551(c) 19

Driver's Privacy Protection Act, 18 U.S.C.S. §§ 2721-2725 (Law. Co-op. 1999) ..... passim

Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 19

Other Authorities

Public Papers of the Presidents 9

Constitutional Provisions

U.S. Const. Art. I, § 8, para. 3 ..... 2, 16

U.S. Const. Art. IV, § 4 ..... 18, 19, 20

Founding Documents

Elliot, Jonathan, *Debates on the Federal Convention* (2d ed. 1863) 12, 13, 22

Madison, James, *Journal of the Federal Convention* (E.H. Scott ed., 1893) 10, 22

Madison, James, *Letters and Other Writings of James Madison* (Lippincott ed. 1865) 11, 22, 23

Records of the Federal Convention of 1787 (M. Farrand ed. 1911) 22

The Federalist No. 15 (A. Hamilton) (J. Hamilton ed. 1869) 11

The Federalist No. 33 (A. Hamilton) (J. Hamilton ed. 1869) 20

The Federalist No. 39 (J. Madison) (J. Hamilton ed. 1869)..... 11, 12

INTEREST OF THE *AMICUS*[1]

The Home School Legal Defense Association is a membership organization representing over 60,000 families and approximately 200,000 children. HSLDA's advocacy of its members' interest frequently involves litigation concerning a family's constitutional rights. It is the position of the organization that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and all rights including those important to our association. Accordingly, HSLDA has begun the Original Intent Project to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our first brief, we argued that principles of *dual sovereignty* kept probation officers from suing an unconsenting state for damages in its own courts on Commerce Clause grounds. *Alden v. Maine*, 119 S. Ct. 2240 (1999). In this brief, we argue that dual sovereignty prohibits Congress from directly regulating state governments through the Commerce Clause. In both briefs, our interest is simply to ensure that we secure the blessings of liberty for ourselves and our posterity. We believe this can best be achieved by faithful adherence to the original intent of the Constitution.

---

[1] This brief was not authored in whole or in part by counsel for any party. It has been funded in its entirety by the *amicus curiae*. *See* Sup. Ct. Rule 37.6.

The *amicus curiae* requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. *See* Sup. Ct. Rule No. 37.3(a).

SUMMARY OF ARGUMENT

When our Founders invented federalism, they created a system of *dual sovereignty*. The central principle of dual sovereignty is that each American is subject to two governments, but neither of those governments is subject to the other. "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz v. United States*, 521 U.S. 898, 920 (1997), *quoting New York v. United States*, 505 U.S. 144, 166 (1992). The Driver's Privacy Protection Act, 18 U.S.C.S. §§ 2721-2725 (Law. Co-op. 1999) ("DPPA"), violates the fundamental of dual sovereignty because it subjects state governments to federal control.

There are exceptions to this rule of dual sovereignty. For example, our Founders were unable to solve the problem of slavery at the time the Constitution was drafted, and agreed to compromise—for the time being. The Civil War ended that uneasy truce. The Civil War Amendments placed certain limits on state power over life, liberty, and property, and authorized congressional action to enforce those limits. These amendments are the only *right* way for Congress to regulate states directly.

The Civil War Amendments were not intended to obliterate state sovereignty, however. Unfortunately, both this Court and Congress have run roughshod over state sovereignty during the last century. During the *Lochner* era, this Court struck down state legislation time and again. But the Court had hardly even begun to regret the excesses of that era before Congress took over the role of federal bully, largely by expanding its power under the Commerce Clause.

Of all the elastic clauses in the Constitution, the Commerce Clause is probably the most overextended. In this case, Congress has asserted that its power to regulate com-

merce "among the several states" gives it power to tell states how to structure their motor vehicle databases. Article I, § 8, paragraph 3 gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Our Founders intended Congress to have much more power over foreign commerce than over interstate commerce, but Congress cannot use its power over foreign commerce to tell a foreign government how to set up its databases. How, then, can Congress use its power to regulate interstate commerce to regulate the states themselves?

There may not be many Americans who know why the Constitution was framed the way it was. Perhaps some Americans would prefer to have Congress enact expedient solutions for every crisis of the day—but not us. It is popular to uphold the Constitution when the Bill of Rights is threatened, but it is just as important to uphold it by keeping each branch of government within its constitutional limits. Restraining Congress in this case may or may not be popular, but it is constitutionally required. We therefore urge this Court to preserve our freedom through federalism, and declare DPPA unconstitutional.

ARGUMENT

I.

OUR FOUNDERS ORIGINALLY INTENDED TO PROHIBIT DIRECT FEDERAL REGULATION OF STATE GOVERNMENTS

A. THE ORIGINAL INTENT OF THE FOUNDERS

Dual sovereignty lies at the very heart of our Constitution. As Justice Kennedy recently explained: "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, *each protected from incursion by the other*." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995). (Kennedy, J., concurring) [emphasis supplied].

It was not always so. After the Revolution, the states had ratified Articles of Confederation that provided little power over states and none over individuals. It created a league, not a government, and it functioned—or failed to function—like any other treaty. The federalism that replaced it was a radical innovation in government—and one that has been radically successful. This case will help determine whether we keep the flame of federalism alive or allow it to be snuffed out by the fitful winds of expediency.

The flame of federalism was lit at the Constitutional Convention in Philadelphia in 1787, but not without effort. The large states and small states could not agree on how to form one central government that would adequately protect the interests of each. After weeks of frustration, Benjamin Franklin said:

> We, indeed, seem to feel our own want of political wisdom since we have been running about in search of it. We have gone back to ancient history for models of government, and examined the different forms of those republics which, having been formed with the seeds of their own dissolution, now no longer exist. And we have viewed modern States all round Europe, but find none of their Constitutions suitable to our circumstances.[2]

1 James Madison, *Journal of the Federal Convention* 259-260 (E.H. Scott ed., 1893) [hereinafter, Madison's Journal].

Diamonds are forged in the unimaginable heat and pressure of the Earth's interior. Our Constitution was forged in a Philadelphia furnace of summer heat and flaring tempers. James Madison explained it to Thomas Jefferson, when he sent him a copy of the new Constitution. Madison wrote:

> It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of sovereign states. A *voluntary* observance of the federal law by all the members could never be hoped for. A *compulsive* one could evidently never be reduced to practice; and if it could, involved equal calamities to the innocent and the guilty, the necessity of a military force, both obnoxious and dangerous, and, in general, a scene resembling much more a civil war than the administration of a regular government.

---

[2] Franklin went on to call the delegates to prayer: "In this situation of this assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, sir, that we have not hitherto once thought of humbly applying to the Father of lights, to illuminate our understandings?" *Id.*

> Hence was embraced the alternative of a government which, instead of operating on the states, should operate without their intervention on the individuals composing them....

1 James Madison, *Letters and Other Writings of James Madison* 344 (Lippincott ed. 1865) [hereinafter, Madison's Writings] [emphasis in original].

The federalist breakthrough was *not* that the Constitution would add new "powers over people" to the limited "powers over states" that already existed under the Articles of Confederation. The idea was to substitute the one for the other. Alexander Hamilton explained that the Constitution marked the "difference between a league and a government" because it extended "the authority of the union to the persons of the citizens, — *the only proper objects of government.*" *The Federalist No. 15*, at 149 (A. Hamilton) (J. Hamilton ed. 1869) [emphasis supplied].

This was no idle comment. The Founders really intended to renounce federal power over the states at the same time they created federal power over individuals. James Madison expressed it thus: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, *no more subject*, within their respective spheres, *to the general authority than the general authority is subject to them*, within its own sphere." *The Federalist No. 39*, at 259 (J. Madison) (J. Hamilton ed. 1869) [emphasis supplied].

The "spheres" that Madison refers to are not fragile soap bubbles, but indestructible states in an indissoluble union. *See, Virginia v. West Virginia,* 246 U.S. 565, 602 (1918). The federal jurisdiction, Madison insisted, "extends to certain enumerated objects only, and leaves to the States a residuary and *inviolable* sovereignty over all other objects." *The Federalist No. 39*, *supra*, at 259 (J. Madison) [emphasis supplied].

The fervent anti-federalists were ready to assume the very worst about every jot and tittle of the new Constitution. Yet even they failed to imagine that Congress could use Article I power to affect the internal policy or administration of the states. On the contrary, Col. William Richardson Davie stated in the North Carolina Ratification Convention, "There is not one instance of a power given to the United States, whereby the internal policy or administration of the states is affected." 4 Elliot 159, *supra*.

During the ratification debates, Charles Pinckney told the South Carolina House of Representatives that "the necessity of having a government which should at once operate upon the people, *and not upon the states*, was conceived to be indispensable by every delegation present." 4 Elliot's Debates on the Federal Convention 256 (2d ed. 1863) [emphasis added]. South Carolina would probably not have ratified the Constitution without Pinckney's assurance on this point. South Carolina has relied upon Pinckney's promise to this day. But DPPA breaks that promise.

B. Freedom Through Federalism

Not everyone agreed that dual sovereignty was the right solution. One ardent Virginia patriot objected to it strenuously. As the Virginia legislature gathered to consider ratification, Patrick Henry reminded them that "no man can serve two masters." 3 Elliot 233, 539, *supra*. But John Marshall turned this self-evident fact into a powerful argument for freedom and federalism.

Marshall did not question Patrick Henry's premise. Instead, he turned it inside out: "Are they [the federal and state

governments] not *both* the *servants* of the people?" 3 Elliot 233, *supra* [emphasis supplied].

Our Founders took the thesis of state sovereignty and its antithesis, national sovereignty, and forged a synthesis in which the *people* exercised ultimate authority. Justice Kennedy has recently elaborated on this theme:

> Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, (J. Madison)....
>
> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. In the tension between federal and state power lies the promise of liberty.

United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

The founding generation ratified the Constitution to secure the "blessings of liberty to ourselves and our posterity." U.S. Const. Preamble. They understood that government *rules* the people when its power is undivided; but when its power is divided, government *serves* the people.

Sadly, many modern Americans have never learned this lesson. We retain our Founders' words, but we lack their wisdom. Whenever a problem appears, we clamor for Congress to "solve" it for us. But, as Justice O'Connor has noted:

> [T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may *resist the temptation* to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 505 U.S. at 187 [emphasis supplied].

C. NATIONALISM V. FEDERALISM

This case pits national power against federalist principles. There is no force for nationalism like war, and America was effectively "at war" through most of the twentieth century. In addition to the two declared wars, there were Korea and Vietnam and all the other undeclared conflicts of the Cold War. There was even a "War on Poverty."

President Nixon declared "war" on inflation. He said, "The time has come for a new economic policy for the United States. Its targets are unemployment, inflation, and international speculation. And this is how we are going to attack those targets." Pub. Papers, Richard Nixon 1971, Pg. 886, Item 264, August 15 [emphasis supplied]. One of these targets turned out to be the State of Ohio.

Ohio had voted for a 10.6 percent pay increase for state workers, which exceeded Nixon's wage and price controls. Nixon's Pay Board refused to permit pay increases greater than 7 percent. Two state employees sued for back pay and the Ohio Supreme Court ordered the full amount to be paid. *State ex rel. Fry v. Ferguson*, 34 Ohio St. 2d 252, 298 N.E. 2d 129 (1973). The United States filed suit in federal court to keep Ohio from obeying a *mandamus* issued by the Ohio court.

The federal judge prohibited the State of Ohio from obeying its own judges by paying its own workers. This marked an unprecedented federal incursion into state sovereignty, which was appealed all the way to this Court. A majority of this Court upheld wage and price controls on the state. *Fry v. United States*, 421 U.S. 542 (1975). After all, if the nation declares "war" on inflation, it can hardly let the states make a separate peace.

Justice Rehnquist dissented, basing his objections squarely on the concept of dual sovereignty:

> Both [the Tenth and Eleventh] Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.

Fry, 421 U.S. at 557 (1975) (Rehnquist, J., dissenting).

In hindsight, Nixon's wage and price controls were not such a great idea. This *amicus* believes they were bad economic policy and worse constitutional law. Declaring "war" on inflation led to constitutional absurdity—but, then, war is always a breeding ground for hysteria.

In 1975, Justice Rehnquist was a lone voice crying in the wilderness. His view briefly gained majority status in 1976, when this Court invalidated federal regulation of state employment practices. Rehnquist wrote:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

D. The Renaissance of Dual Sovereignty

This federalist victory did not last for long. It was premised on a Tenth Amendment protection of "core governmental functions," rather than sovereignty as such, and it proved too subjective to protect much. Abandoning the effort to preserve the distinction, Justice Blackmun wrote the majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Justice Rehnquist wrote a short dissent to *Garcia*. It ended with a prediction: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the sup-

port of a majority of this Court." *Garcia*, 469 U.S. at 580. That prediction proved prophetic.

Our Founders wrote a tough Constitution, resilient enough to withstand the stress of history. The core principles of the Constitution have outlasted this century's challenges. The Berlin Wall fell in 1989. The "massive resistance" of racist state and local governments is a fading memory. The struggle to survive in the shadow of 10,000 Soviet missiles has been replaced by the struggle for—driver's privacy.

Dual sovereignty emerged from the ashes of *Garcia* in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *Gregory* did not overrule *Garcia*, but it applied *Garcia* in a way that upheld state sovereignty. "Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise." *Garcia*, 501 U.S. at 464 (citations omitted). Mere ambiguity was not enough to justify sacrificing state sovereignty.

Justice O'Connor explained why it was so important to preserve the autonomy of the states. She wrote: "Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory*, 501 U.S. at 458 (internal quotation and citations omitted).

The next year, this Court issued the watershed opinion in *New York v. United States*, 505 U.S. 144 (1992). *New York* is explicit about the reason for limiting the power of Congress. Federalism is a means to the end of freedom. Justice O'Connor wrote:

> The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

New York, 505 U.S. at 181.

Justice Scalia extended the principle of dual sovereignty in *Printz v. United States*, 521 U.S. 898 (1997). Justice Scalia quoted *Gregory* with approval, "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Printz*, 521 U.S. at 921, *citing Gregory*, *supra*, at 458.

This Court's federalism is all about a freer and stronger America. Each time the federal government "solves" a problem, 50 state governments are shut out of the process. Sometimes, of course, it is only the federal government that is competent to act. South Carolina should not unilaterally send National Guard units off to Kosovo. But there are other areas—including, in our opinion, the protection of driver privacy—where we still need all 50 "laboratories of democracy."[3]

---

[3] Ironically, the Department of Justice turns the venerable notion of 50 state laboratories experimenting with freedom inside out, and wants Congress to experiment on the states, instead. The Department says, "A constitutional rule precluding Congress from regulating state activity in or affecting commerce unless and until it enacts a law covering similar private activity would deprive Congress of the much-needed *ability to experiment* in addressing regulatory concerns in complex fields such as this one, and could have highly undesirable results." US Brief, p. 42 [empha-

If there had been any doubts about the seriousness of the Court's commitment to this "shining gem" of federalism, those doubts vanished when the Court issued three separate sovereign immunity rulings on one day—June 23, 1999: *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Savings Bank v. Florida Prepaid*, *supra*; and *Florida Prepaid v. College Savings Bank*, 119 S. Ct. 2199 (1999). Justice Kennedy wrote:

> By "splitting the atom of sovereignty," the Founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. . . . When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.

Alden, 119 S. Ct. at 2265 [internal quotations and citations omitted].

DPPA asserts authority over the internal operations of state government. Alexander Hamilton would have labeled it "an invasion of the residuary authorities of the smaller societies." This Court reaffirmed Hamilton's analysis in *Printz* and *Alden*:

> It will not follow from this doctrine, that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme

sis supplied]. The states are supposed to be the *laboratories* of democracy, not the *guinea pigs*.

> law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.

The Federalist No. 33, at 226 (A. Hamilton) (J. Hamilton ed. 1869) [emphasis in original], *see Alden*, 119 S. Ct. at 2256; *Printz*, at 924.

Our Founders had a vision of a strong but *limited* central government. We needed that *strength* to end slavery and to hold an evil empire at bay. But we need *limits* to keep Congress from taking over the job of every state and local government. This Court should uphold those limits and strike down DPPA.

II.

DPPA Exceeds the Limited Power Our Founders Granted to Regulate "Commerce Among the Several States"

Given this Court's explicit enunciation of the principle of dual sovereignty over the last decade, this case is easy to decide. But even if this Court had not clearly articulated these structural protections for state sovereignty in general, the more specific limits of the Commerce Clause would compel the same result. As we shall show, the language and history of the Commerce Clause prove that it *cannot* be used to assert direct regulatory power over a state government.

A. The Text of the Commerce Clause is Quite Limited

The Commerce Clause appears in Article I, § 8, paragraph 3. The entire paragraph gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." According to the

text, Congress has no more Commerce Clause power to regulate *states* directly than it has to regulate *foreign nations* directly.

No one suggests that Congress can use its power to regulate commerce with Indian tribes to directly regulate the tribes themselves. No one suggests that Congress can use its power to regulate commerce with foreign nations to impose direct obligations upon foreign governments. Can Congress really use its power to regulate commerce "among the several states" to regulate the states themselves?

This Court should ask DPPA's supporters whether Congress's power over foreign commerce allows it to tell Mexico how to structure its databases. The answer, of course, is "no." This Court should then ask why the same words in the same sentence of the same paragraph of the Constitution should be understood to give Congress *more* power over state governments than it gives over foreign governments. DPPA's supporters cannot point to anything in the text or legislative history of the Commerce Clause that would support that claim. Neither can they point to any precedent for direct congressional regulation of a state government as such. Without text, purpose, or precedent to support it, DPPA must fail.

B. Our Founders Saw The Commerce Power As Very Limited

The chief architect of our Constitution argued that Congress' power over interstate commerce is *less than* its power over commerce with foreign nations. In the Virginia Ratification Convention, James Madison noted federal jurisdiction over "external objects" such as "foreign commerce," and carefully distinguished that from the "internal order" of the States. He then argued against the idea that Congress should have the same power over both. "Would it not be considered

as a dangerous principle in the British Government were the king to have the same power in internal regulation as he has in the external business of treaties?" 3 Elliot 515, *supra*.

Madison wrote, "In expounding the Constitution and deducing the intention of its framers, it should never be forgotten, that the great object of the Convention was to provide, by a new Constitution, a remedy for the defects of the existing one." 4 Madison's Writings 253, *supra*. While the Founders were eager to build up a strong national trade with foreign nations, their *domestic* concern was purely to prevent one State from stacking the deck against its neighbors.

Madison said, "It would be unjust to the States whose produce was exported by their neighbors, to leave it subject to be taxed by the latter." 2 Madison's Journal 539, *supra*. Wilson "dwelt on the injustice and impolicy of leaving N. Jersey, Connecticut &c any longer subject to the exactions of their commercial neighbors." *Id.* at *540*. John Mercer spoke to the same effect in the Convention. *Id.*. So did Thomas Dawes in Massachusetts, 2 Elliot 57-58 *supra*, Oliver Ellsworth in Connecticut, *Id.*, 189, 192, and Patrick Henry in Virginia, *Id.*, 158. Madison said it was necessary to remove "existing & injurious retaliations among the States." 2 Records of the Federal Convention of 1787, p. 451 (M. Farrand ed. 1911). James McHenry said, "Perhaps a power to restrain any State from demanding tribute from citizens of another State … is comprehended in the power to regulate trade between State and State." 2 Farrand 504. Madison argued, "[P]erhaps the best guard against an abuse of power of the States on this subject, was the right in the Genl. Government to regulate trade between State and State." 2 Farrand 588-89. Sherman stated that "The oppression of the uncommercial States was guarded agst. by the power to regulate trade between the States." 2 Farrand 308. Ellsworth said that "the power of regulating trade between the States will protect them agst. each other." 2 Farrand 359-60.

Madison expressed himself more clearly on this point later in life. In 1829, he wrote:

> Being in the same terms with the power over foreign commerce the same extent, if taken literally, would belong to [interstate commerce]. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.

4 Madison's Writings 14, *supra*.

Our Founders very much wanted to keep the states from interfering with each other's trade, but they had no intention of giving away any other powers that states had previously exercised over economic matters. DPPA does not keep states from interfering with each other's trade. DPPA interferes with the states themselves. DPPA turns the Commerce Clause on its head and is therefore unconstitutional.

C. The Commerce Clause Must Never Be Misused to Violate the Guarantee of a "Republican Form of Government"

South Carolina is supposed to be governed by *South Carolina* voters, not by voters from Alabama, Alaska, Arizona, Arkansas, and so forth. If Congress could directly regulate the states under the Commerce Clause, then the states would no longer be self-governing states. That would violate at least the spirit of the Guarantee Clause. U.S. Const. Art. IV, § 4.

There *are* problems that can only be solved at the federal level, like junk mail. States cannot prohibit junk mail, since that would violate the Dormant Commerce Clause and interfere with the federal mail service. The only way to regulate the direct mail industry would be through federal legislation. We cannot think of any significant constitutional problems with a federal law prohibiting the direct mail use of certain kinds of database information, even if some of the databases were owned and operated by states. In such a case, Congress would be regulating commerce, not states.[4]

If citizens want to protect themselves from junk mail, they can lobby Congress for Commerce Clause legislation. But if they want to protect themselves from their own state governments, that choice is not available. They can rely upon the Civil War Amendments or else petition *that* government for redress of grievances. Nothing else will preserve a republican form of government in every state.

Federalism forces the states to grapple with important problems, which helps fulfill the guarantee that every state shall maintain a "republican form of government." The Constitution requires states to be more than couch potatoes watching C-Span. But this means the federal government must leave important problems for the states to solve. A number of states have filed *amicus* briefs with this Court, because these states view drivers' privacy as the kind of important problems that states ought to be able to solve. This is good news! It is first-hand evidence that government of the

---

[4] It might be hard for Congress to enact such legislation over the well-funded opposition of the entire direct mail industry, but that is a structural protection of state's interests that is completely in line with the majority opinion in *Garcia, supra*. It is worth noting that the federal privacy acts that apply to the commercial sector do not prohibit the disclosure or sale of name and address information to private parties. *See, e.g.*, the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b)(2)(D); the Cable Communications Policy Act of 1984, 47 U.S.C. § 551(c)(2)(C).

people, of the people, and for the people—*of the states*—has not yet perished from the land.

Vigorous state government is good for America, but a republican form of government in every state would be constitutionally required whether or not it happened to be useful. As Justice O'Connor has explained:

> Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States v. Butler*, 297 U.S. 1 (1936).

New York, 505 U.S. at 157.

If citizens want to change their own state's laws, they should get involved in the political process. If they want to change some other state's laws, they should move there. Congress has no right to let the citizens of other states run the state of South Carolina. South Carolina is supposed to be governed by a South Carolina legislature elected by South Carolina voters, but DPPA turns it into a state governed by a United States Congress elected by voters from all 50 states. That is why DPPA is unconstitutional.

CONCLUSION

For the foregoing reasons your *amicus* suggests that due respect for the original intent of the Constitution requires affirmation of the decision below.

Respectfully Submitted,

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Home School Legal Defense Association
119 C Street, SE
Washington, DC 20003
(202) 547-9222

*Counsel of Record

SEPTEMBER, 1999